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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

NATIONAL COLLEGIATE LOAN  
TRUST 2006-4, et al.,

Plaintiffs and Respondents,

v.

DANTE TAYLOR,

Defendant and Appellant.

A149967

(San Francisco County  
Super. Ct. No. CGC-15-545319)

Appellant Dante Taylor (appellant) borrowed over \$50,000 to finance his education at the University of Washington. Respondents National Collegiate Student Loan Trust 2006-4 and National Collegiate Student Loan Trust 2007-3 (respondents) are two securitized Delaware trusts that claim they were assigned the loans at the time of origination. Respondents brought suit against appellant on the loans after he failed to make payments, and the trial court entered judgment in their favor following a bench trial. We affirm.

## BACKGROUND

In September 2013, each of the respondent trusts filed a breach of contract action against appellant alleging appellant had failed to make payments on his education loans; the actions were consolidated.<sup>1</sup>

In January 2016, the trial court conducted a bench trial on respondents' claims. Appellant admitted in his testimony that in 2006 and 2007 he borrowed \$58,450 in two loans to finance studies at the University of Washington. The original lender on both loans was Charter One Bank, N.A. (Charter One), predecessor to RBS Citizens, N.A.

To support their claims, respondents presented the testimony of Graham Hord, a "legal case manager" employed by Transworld Systems, Incorporated (Transworld). Mr. Hord testified Transworld is the designated custodian of records for respondents and one of respondents' loan servicers. He testified appellant's loans became due in March 2010, following two deferments sought by appellant. Respondents sought to admit through Mr. Hord's testimony a number of documents evidencing the loan agreements and assignments to respondents. Appellant objected that the documents were hearsay and inadmissible under the business records exception to the hearsay rule. The trial court sustained the objection as to certain documents and overruled the objection as to other documents. The documents admitted into evidence showed that appellant's loans were each assigned to one of the two respondent trusts pursuant to "Deposit and Sale Agreements" and "Pool Supplements."

In June 2016, the trial court entered judgment in favor of respondents in the amount of \$58,450.

This appeal followed.

## DISCUSSION

### I. *Appellant Forfeited Any Statute of Limitations Defense*

Appellant contends respondents' claims are barred by Delaware's three-year statute of limitations, or, in the alternative, by Pennsylvania's four-year limitations

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<sup>1</sup> Only one of the two complaints is in the record, but there is no dispute both trusts filed complaints in September 2013.

period. He concedes that, although he pleaded the statute of limitations as a defense in his answers, he did not assert the defense at trial. (See *RRLH, Inc. v. Saddleback Valley Unified School Dist.* (1990) 222 Cal.App.3d 1602, 1606–1607, fn. 2 [statute of limitations defense asserted in answer but not at trial is waived].)<sup>2</sup> Nevertheless, he asserts that the issue is a pure question of law and requests that this court exercise its discretion to consider the defense, despite his failure to assert it below. (*Yeap v. Leake* (1997) 60 Cal.App.4th 591, 599, fn. 6 [“the appellate court has the discretion to consider a new issue on appeal where it involves a pure question of the application of law to undisputed facts”].) We decline to do so.

Appellant argues it is appropriate for this court to exercise its discretion to consider his statute of limitations defense because he could not have raised the issue below. He claims his defense is based on the Ohio Supreme Court’s 2016 decision in *Taylor v. First Resolution Inv. Corp.* (2016) 148 Ohio St.3d 627, published after trial in the present case, which applied a three-year Delaware statute of limitations to an action brought in Ohio. However, the *Taylor* decision was based on an Ohio “borrowing statute” enacted in 2004 that unambiguously bars an action where it would be barred under the statute of limitations in the state where the action accrued. (Ohio Rev. Code Ann. § 2305.03; *Taylor*, at pp. 637, 640–641.) Although *Taylor* provided modest clarification about how to determine where an action accrues, the decision did not overrule any prior Ohio caselaw on the issue. (*Taylor*, at pp. 638–640.) To the contrary, the Ohio precedent, as well as all the non-Ohio precedent discussed in the opinion, supported the same conclusion reached by the *Taylor* court—that the action accrued where the loss was suffered. (*Id.* at p. 638, discussing *Meekison v. Groschner* (1950) 153 Ohio St. 301; see also *Taylor*, at p. 640 [“We follow our own precedent and that of New York’s highest court and the cited federal courts . . .”].) Accordingly, nothing prevented

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<sup>2</sup> We reject appellant’s suggestion that the limited testimony presented by respondents that is relevant on the statute of limitations issue shows the issue was tried below. Indeed, elsewhere in his briefs appellant concedes that at trial “the parties operated with Ohio’s eight-year period in mind.”

appellant from arguing for the application of Delaware's statute of limitations at trial in the present case, based on Ohio's borrowing statute.

Appellant's statute of limitations defense was forfeited and will not be considered on appeal. (See *Professional Collection Consultants v. Lauron* (2017) 8 Cal.App.5th 958, 972 [statute of limitations defense not asserted in the trial court forfeited].)

## II. *The Challenged Exhibits Were Not Hearsay*

Appellant contends the trial court erred in admitting respondents' exhibits 1, 3, 4, 5, 10, 12, 13, and 14 under the business records exception to the hearsay rule. His claim fails because the exhibits were admissible as operative acts and not subject to exclusion as hearsay in the present case.

Respondents' exhibit list below describes the exhibits at issue as follows: "Copy of Loan Request/Credit Agreement" (exhibit 1); "Copy of 2006-4 Pool Supplement, Bank One, N.A." (exhibit 3); "Copy of Schedule [2] to 2006-4 Pool Supplement, Bank One, N.A." (exhibit 4); "Copy of Deposit and Sale Agreement, The National Collegiate Student Loan Trust 2006-4" (exhibit 5); "Copy of Loan Request/Credit Agreement" (exhibit 10); "Copy of 2007-3 Pool Supplement, Bank One, N.A." (exhibit 12); "Copy of Schedule [2] to 2007-3 Pool Supplement, Bank One, N.A." (exhibit 13); "Copy of Deposit and Sale Agreement, The National Collegiate Student Loan Trust 2007-3" (exhibit 14).<sup>3</sup> As appellant explains and respondents do not dispute, the exhibits were offered to prove "the loan terms . . . and that the loans originally made by a lending bank had been transferred in a chain of assignments resulting in ownership by [r]espondents."

Appellant contends the exhibits were hearsay and respondents' witness, Mr. Hord, failed to lay the foundation required to admit the exhibits under the business records exception to the hearsay rule (Evid. Code, § 1271).<sup>4</sup> Appellant's argument is misplaced

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<sup>3</sup> The exhibit list refers to exhibits 4 and 13 as copies of schedule one, but the exhibits are actually copies of excerpts from schedule two to the respective pool supplement agreements.

<sup>4</sup> Mr. Hord testified his employer, Transworld, "is the designated custodian of record for [respondents] as well as one of its servicers." He also testified that Transworld "keeps and maintains business records for" respondents, that he was "personally familiar with

because, as respondents point out, the documents evidencing the loans and assignment of the loans constitute operative facts and were not actually admitted for the truth of the matters asserted.<sup>5</sup> “ ‘If a fact in controversy is whether certain words were spoken or written and not whether the words were true, evidence that these words were spoken or written is admissible as nonhearsay evidence.’ ” (*People v. Fields* (1998) 61 Cal.App.4th 1063, 1068; accord *Meeks v. Autozone, Inc.* (2018) 24 Cal.App.5th 855, 865; see also *People v. Smith* (2009) 179 Cal.App.4th 986, 1003 [“Written or spoken words offered as original evidence rather than for their truth are generally referred to as ‘operative facts.’ ”]; *People v. Jimenez* (1995) 38 Cal.App.4th 795, 802 [“An operative fact, such as words forming an agreement, is not hearsay.”]; *People v. Dell, supra*, 232 Cal.App.3d at pp. 261–262 [“ ‘Where the utterance of specific words is itself a part of the details of the issue under the substantive law and the pleadings, their utterances may be proved without violation of the hearsay rule’ ”].)

As the court explained in *Zuckerman v. Pacific Savings Bank* (1986) 187 Cal.App.3d 1394, “A well-established exception or departure from the hearsay rule applies to cases in which the very fact in controversy is whether certain things were said and not whether these things were true or false, and in these cases the words are admissible not as hearsay, but as original evidence. [Citation.] Thus, written or oral utterances, which are acts in themselves constituting legal results in issue in the case, do not come under the hearsay rule.” (*Id.* at p. 1404, fn. 2; accord *Kunec v. Brea*

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the method by which [respondents] record, keep and maintain their business records,” and that he had previously testified “as a custodian of record” for respondents. Appellant contends Mr. Hord’s testimony was insufficient proof he was “authorized to testify on behalf of [r]espondents.” However, appellant cites no authority for the proposition that Mr. Hord’s testimony, based on his personal experience acting as a custodian of record for respondents, was insufficient. (See *van’t Rood v. County of Santa Clara* (2003) 113 Cal.App.4th 549, 573 [“ ‘Proof of an agency relationship may be established by “evidence of the acts of the parties and their oral and written communications,” ’ ” as well as by “circumstantial evidence.”].)

<sup>5</sup> “It is immaterial if the ground relied on below was erroneous if the action taken, i.e., admission of the evidence, was otherwise proper.” (*People v. Dell* (1991) 232 Cal.App.3d 248, 258.)

*Redevelopment Agency* (1997) 55 Cal.App.4th 511, 524.) Analogous to the present case, *Zuckerman* involved enforcement of a promissory note for a real property loan and the documents at issue “evidence[d] the contractual relationship between” the lender and borrower. (*Zuckerman*, at p. 1404.)

Also analogous is the decision in *Bank of America v. Taliaferro* (1956) 144 Cal.App.2d 578. There, a bank brought an action as the assignee of a sales contract for a refrigerator. (*Id.* at p. 580.) According to the decision, “[t]he contract, made on a printed form of the Bank, provided for payment of the installments to the Bank, . . . and on its reverse contained the assignment to the Bank for value received (sale) of the contract and the property therein described.” (*Ibid.*) The court of appeal affirmed rejection of defendant’s objection to admission of the contract and assignment on hearsay grounds because the contract and assignment were “not merely statements or assertions offered as evidence of the truth of what is stated, but acts in themselves constituting legal results in issue in the case.” (*Id.* at pp. 581–582.)

Appellant fails to meaningfully respond to respondents’ argument based on the operative facts doctrine. He essentially concedes the loan agreements were admissible under the doctrine, stating “[a]t best, the loan agreements would be operative facts as to the original creditor . . . .” He denies the same is true of the documents evidencing an assignment to respondents, but his reasoning is unclear. He argues, “[Mr.] Hord has no firsthand knowledge of the alleged assignments as he did not work for either company when the assignments were allegedly created.” But that reasoning would apply to both the loan agreements and the assignments, all of which were created before Mr. Hord started working for Transworld. It may be that appellant means to argue the evidence before the trial court was insufficient to establish the authenticity of the challenged exhibits showing assignment of the loans. If so, appellant has failed to present any reasoned argument on that issue. (See *Remington Investments, Inc. v. Hamedani* (1997) 55 Cal.App.4th 1033, 1042 [“The Promissory Note document itself is not a business record as that term is used in the law of hearsay, but rather is an operative contractual document admissible merely upon adequate evidence of authenticity. Sufficient evidence

of authenticity to support admission of the Promissory Note document could be supplied by numerous means”]; see also Evid. Code, §§ 1400 et seq.)

Further, appellant cites no portion of the record showing he objected during trial to admission of the assignment documents on authenticity grounds, as opposed to hearsay grounds. (See *Gonzalez v. Santa Clara County Dept. of Social Services* (2017) 9 Cal.App.5th 162, 173–174 [authenticity objection “forfeited” where not raised “at an appropriate time” because it deprives “the proponent of any opportunity to . . . cure the objection”]; *Jazayeri v. Mao* (2009) 174 Cal.App.4th 301, 320 [“respondents did not raise failure to authenticate as a ground for excluding appellants’ exhibits”]; *Taliaferro, supra*, 144 Cal.App.2d at p. 582 [the “ground” of the forfeiture “rule is that the proponent would have had opportunity to obviate the objection if it had been made at the trial”].)<sup>6</sup>

Because the loan agreements and assignments were admissible as operative facts, appellant’s contention they were inadmissible under the hearsay rule is without merit.<sup>7</sup>

#### DISPOSITION

The trial court’s judgment is affirmed. Costs on appeal are awarded to respondents.

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<sup>6</sup> At oral argument, appellant’s counsel argued an objection on authenticity grounds was preserved by appellant’s objection that “foundation” for admission of various exhibits was lacking. However, Evidence Code section 353, subdivision (a), provides that a judgment shall not be reversed based on the erroneous admission of evidence unless “[t]here appears of record an objection to or a motion to exclude or to strike the evidence that was timely made and so stated as to make clear the specific ground of the objection or motion.” Appellant’s objection based on lack of “foundation” did not preserve an objection based on authenticity grounds. (*People v. Moore* (1970) 13 Cal.App.3d 424, 434, fn. 8 [“[W]here the objection is lack of proper foundation, counsel must point out specifically in what respect the foundation is deficient.”]; see also *People v. Demetrulias* (2006) 39 Cal.4th 1, 21–22 [“defense objection of ‘relevance and speculation, foundation,’ ” was insufficient to preserve for appeal claim that testimony constituted improper character evidence].)

<sup>7</sup> It is unnecessary to decide whether the documents were also admissible as business records. It is also unnecessary to address appellant’s argument that certain documents were inadmissible as business records because they were created in anticipation of litigation. Respondents’ January 16, 2018 request for judicial notice is denied because consideration of the materials is unnecessary to resolution of the appeal.

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SIMONS, J.

We concur.

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JONES, P.J.

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NEEDHAM, J.

(A149967)